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No. 09-775

Supreme Court, U.S.
FILED
FEB - 3 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,

Petitioner,

v.

MICHAEL BAKER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Michael Baker respectfully requests denial of the Commonwealth of Kentucky's petition for a writ of certiorari to review the judgment of the Kentucky Supreme Court.

OPINION BELOW

The opinion of the Kentucky Supreme Court (Pet. App. at 1a-32a) is reported as *Commonwealth v. Baker*, 295 S.W.3d 437, 2009 WL 3161371 (Ky. 2009).

JURISDICTION

The judgment of the Kentucky Supreme Court was rendered October 1, 2009. Pet. App. at 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The Respondent is satisfied and in agreement with the Petitioner's statement regarding the procedural history and facts of this matter.

REASONS TO DENY THE WRIT OF CERTIORARI

"It is a firm rule that 'This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Moore v. Texas*, 535 U.S. 1044 (2002), citing *Coleman v. Thompson*, 501 U.S. 722, at 729 (1991). In this matter, the Kentucky Supreme Court found KRS 17.545 was a violation of the ex post facto clauses of Article 1, Section 10 of the United States Constitution and Section 19(1) of the Kentucky Constitution. Pet. App. at 5a. The Kentucky Supreme Court's decision is based upon independent state law grounds and has adequate support for the judgment.

The Kentucky Supreme Court has consistently held that the retroactive application of sex offender registration and residency restriction laws are violations of Section 19(1) of the Kentucky Constitution. *Peterson v. Shake*, 120 S.W.3d 707 (Ky. 2003); *Dickerson v. Commonwealth*, 174 S.W.3d 451 (Ky. 2005). In *Peterson* and *Dickerson*, the Kentucky Supreme Court found that the 2000 amendments to the sex offender registration and residency restriction laws could not be applied retroactively to a person who became a registrant in 1999 when a prior version of the law was in effect; likewise, the 1998 amendments could not be applied retroactively to an offense committed in 1997 when the 1994 version of the law was in effect. *Id.* Consistent with these prior holdings, the

Kentucky Supreme Court found in this matter that the 2006 amendments to the sex offender registration and residency restriction laws could not be applied retroactively to an offender who was convicted prior to the effective date of KRS 17.545 when a different version of the law was in effect. The Kentucky Supreme Court has remained consistent on this issue.

Petitioner incorrectly states that this Court has never considered whether the retroactive application of a statute imposing a residency restriction on sex offenders is an ex post facto violation. In *Smith v. Doe*, 538 U.S. 84 (2003), this Court upheld the Alaska law that retroactively applied registration requirements to sex offenders. In upholding the Alaska law this Court reasoned that it was not an ex post facto violation because the statute imposed no physical restraint and leaves sex offenders "free to change jobs and residences." *Id.* at 90. This Court stated, "Offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." *Id.* at 91. In *Smith*, this Court did consider the retroactive application of residency restrictions when deciding the factors set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Specifically, this Court upheld retroactive application of registration requirements because they did not have residency restrictions attached to them.

The Kentucky Supreme Court gave deference to the legislature's intent to enact a civil, nonpunitive, regulatory scheme. *Smith*, supra, 538 at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

However, by the clearest proof, the Kentucky Supreme Court found all five factors to consider under *Mendoza-Martinez* led to the statute being so punitive in effect that it negated the legislature's intent. Had the Kentucky Supreme Court ignored or failed to give deference to the legislature's intent they would not have so heavily examined the *Mendoza-Martinez* factors. Further, the Kentucky Supreme Court undertook the same ex post facto analysis that this Court did in *Smith* by weighing those factors against the legislature's intent. Petitioner overlooks the Kentucky Supreme Court's strenuous analysis of the *Mendoza-Martinez* factors.

By undertaking the same ex post facto analysis this Court did in *Smith*, the Kentucky Supreme Court performed the job for which it was established. Why do the factors under *Mendoza-Martinez* exist if they are not to be analyzed and weighed. The Kentucky Supreme Court provided deference to the legislature's intent, then determined that KRS 17.545 was so punitive in effect as to negate that intent. This Court acted upon the checks and balances that protect the individual powers of the three branches that make up the United States government when deciding *Smith*. The Kentucky Supreme Court followed this Court's directive when it also acted as a check and balance upon the legislature in determining KRS 17.545 was unconstitutional as an ex post facto violation.

A. THE KENTUCKY SUPREME COURT'S DECISION IS CONSISTENT WITH THE AUTONOMY OF DECISIONS OF OTHER STATE SUPREME COURTS AND FEDERAL COURTS

Petitioner fails to consider the autonomy of the decisions and laws of other states and federal courts. Petitioner also fails to acknowledge the many courts that have decided against the retroactive application of residency restrictions, or upheld registration requirements that had no residency restrictions attached to them.

In *Smith*, this Court upheld Alaska's retroactive application of registration requirements since no residency restrictions existed. The Alaska law allowed sex offenders to live wherever they wish. *Smith*, supra, at 90. In *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 2007), the Sixth Circuit Court of Appeals found Tennessee's sex offender registration law to not be an ex post facto violation. The Tennessee law allows sex offenders the freedom to live and move anywhere they wish as long as they notify authorities of their location. *Id.* The Sixth Circuit stayed consistent with this Court's *Smith* decision in finding retroactive application of registration laws do not amount to an ex post facto violation because the offenders are not subject to residency restrictions.

In *Doe v. Schwarzenegger*, 476 F.Supp.2d 1178 (E.D. Cal. 2007), the court found the California Sexual Predator Punishment and Control Act has only prospective effect and is inapplicable to the

plaintiffs in the case whose convictions and registration predate the effective date of the California law. In *Schwarzenegger*, the Court reasoned that "it is obligated to adopt the interpretation of the law that best avoids constitutional problems." *Id.* at 1181; citing *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). The *Schwarzenegger* court further reasoned that reading the law "retroactively would raise serious ex post facto concerns." *Id.*

The Kentucky Supreme Court's decision in this matter is consistent with the recent trend of cases that examine the punitive purpose and effect of retroactive application of residency restriction laws. The Kentucky Supreme Court ruled consistent with *Pollard v. State*, 908 N.E.2d 1145 (Ind. 2009) and with *Mikaloff v. Walsh*, 5:06-CV-96, 2007 WL 2572268 (N.D. Ohio 2007) in finding that subjecting sex offenders to additional, new or changed residency restrictions for offenses that predated the effective dates of the Indiana and Ohio statutes respectively, violated the sex offenders constitutional rights against ex post facto laws.

Petitioner fails to acknowledge that the Kentucky Supreme Court decision in this matter is consistent with other states and courts that have upheld registration requirements, either while not imposing a residency restriction or while striking it down. Tennessee, Alaska and Minnesota do not impose residency restrictions, yet all three states have registration requirements. Even *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), upon which Petitioner heavily relies,

recognized that residency restrictions are regarded as punishment and restraint which is neither minor nor indirect.

The legislature can intend to create a civil, nonpunitive, regulatory scheme; however, the retroactive application of that residency scheme is an ex post facto violation recognized by other federal courts and state supreme courts.

B. THE KENTUCKY SUPREME COURT DID NOT REFUSE TO FOLLOW THIS COURT'S DIRECTIVE IN *SMITH*

The Kentucky Supreme Court did not refuse to follow this Court's directive in *Smith* that deference be given to the legislature's intent. Quite to the contrary, the Kentucky Supreme Court followed this Court's directive in *Smith* by applying the five *Mendoza-Martinez* factors to determine that the legislature's intent was negated by the punitive purpose and effect of KRS 17.545. If the Kentucky Supreme Court had not thoughtfully considered these factors then they would have ignored this Court's directive in *Smith*. However, by undertaking the exact same analysis as this Court did in *Smith*, the Kentucky Supreme Court followed this Court's directive. Just because the Kentucky Supreme Court's decision is not what Petitioner desired does not mean they did not do their job, nor does it mean they did not consider all the necessary factors and directives this Court previously established in *Smith*. The five

Mendoza-Martinez factors exist for the purpose of judging the punitive purpose and effect of a statute in consideration of the legislature's intent. If the Kentucky Supreme Court ignored this Court's directive in *Smith* by not giving deference to the legislature's intent, they would have determined the legislature's intent was punitive and the enquiry would have ended without considering the purpose and effect factors from *Mendoza-Martinez*.

It is the role of the judicial branch to act as a check and balance on the other branches of government. The Kentucky legislature passed KRS 17.545 and enacted it July 12, 2006. The constitutionality of KRS 17.545 was challenged by Respondent by the filing of the Motion to Dismiss. The Kenton County District Court then acted as the judicial branch is supposed to by judging the constitutionality of KRS 17.545. The Kentucky Supreme Court then further examined the constitutionality of KRS 17.545 as a check and balance on acts passed by the legislature. The Kentucky Supreme Court did the job it is intended to do just as this Court does when federal laws are challenged on constitutional grounds. Courts are the proper venue to determine if laws passed are constitutional. If this constitutional vetting process did not exist, legislatures could enact any law without concern for individual liberty.

Again, the decision of the Kentucky Supreme Court is based upon independent state grounds with adequate support for the decision. *Moore*, supra, at 1044. The Kentucky Supreme Court remained consistent with prior holdings regarding retroactive

application of sex offender laws in *Dickerson* and *Peterson*. This matter is not about the federal law, this case concerns Kentucky's own, individual state law for sex offender residency restrictions.

C. THE QUESTION PRESENTED IN THIS MATTER IS ONE THAT COURTS, COUNTY ATTORNEYS, AND DEPARTMENTS OF CORRECTIONS NATIONWIDE HAVE DETERMINED TO BE AN EX POST FACTO VIOLATION AND ONE THAT DOES NOT ACCOMPLISH WHAT THE RESIDENCY RESTRICTIONS ARE INTENDED TO ACCOMPLISH

How to manage sex offenders and monitor their threat to children is one of national importance given the prevalence of sex offender registration laws and residency restrictions. However, as these laws have continued to expand and be retroactively applied more courts realize the problems and inability of these restrictions to accomplish the protections for children the legislature intended.

According to a report issued by the Colorado Department of Public Safety in 2004, "Placing restrictions on the location of . . . supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism." Jill Levenson, Ph.D., *A Report to the Florida Legislature* (October 2005). Dr. Levenson also referred to a report by the Minnesota Department of Corrections in 2003 on how Minnesota did not implement housing restrictions

because of the many problems and negative consequences they have outweighing the potential benefits. *Id.* Dr. Levenson went on to state that "Despite widespread support and popularity, there is no evidence that residence restrictions prevent sex crimes or increase public safety," and that it is "Emotionally reactive legislation based on fear and anger rather than research and data [that] will not be as effective in keeping our communities safe." *Id.* at 6 and 10. There is absolutely no evidence to support the theory that sex crimes against children have decreased since residency restrictions were created.

"The Iowa County Attorneys Association believes that the . . . residency restriction for persons who have been convicted of sex offenses involving minors does not provide the protection that was originally intended." Iowa County Attorneys Association, *Statement On Sex Offender Residency Restrictions In Iowa* (January 2006). The Iowa County Attorneys Association stated in the report that research shows there is no correlation between residency restrictions and reducing sex offenses and that the unintended effects warrant replacing the restrictions with more effective protective measures to accomplish the purpose intended by these laws. *Id.* The Iowa County Attorneys Association report stated "There is no demonstrated protective effect of the residency requirement." *Id.*

Similarly to the findings of the Iowa County Attorneys Association, state corrections departments, research groups and other courts, along with the Kentucky Supreme Court determined KRS 17.545 was ineffective in accomplishing the protections the

legislature intended. Pet. App. at 15a. The Kentucky Supreme Court was correct in determining that the residency restriction laws are ineffective as children can be at the restricted areas all day with sex offenders present with no legal protection; yet when these prohibited places are closed at night and children are not present, it is illegal for the sex offender to sleep within 1,000 feet of that prohibited area. *Id.* What protections does this law offer? The intended purpose of this law is to protect children, yet it offers no realistic protection and is nothing more than a political placebo. Residency restrictions provide a false sense of security, yet provide little actual protection. There is no magical force field at 1,000 feet that prevents sex offenders from entering these prohibited areas to abduct or abuse children. Residency restriction laws only limit where sex offenders can sleep (reside), providing no protection as they are intended to do. The Kentucky Supreme Court found these restrictions did not rationally relate to the legitimate government purpose of protecting children and were excessive as no real protection is offered by KRS 17.545.

Protecting children from sexual offenders is one of national importance and laws should be enacted by legislatures that actually provide the protections intended instead of just a false sense of security. Legislatures must enact effective and useful legislation for protecting children while at the same time

not infringing on the constitutional rights of individuals.

CONCLUSION

For the foregoing reasons, Respondent prays this Court deny the petition for writ of certiorari by the Petitioner, Commonwealth of Kentucky.

Respectfully submitted,

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